STATE OF MICHIGAN

COURT OF APPEALS

IN RE FORFEITURE/NUISANCE ABATEMENT OF 14541 W. 8 MILE ROAD.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PLATINUM SPORTS, LTD., and PATIO PROPERTIES, INC.,

Defendants-Appellants,

and

14541 W. 8 MILE ROAD, a/k/a ALL STAR LOUNGE, and PAUL MARKOVITZ,

Defendants.

UNPUBLISHED
October 13, 2011

No. 299416
Wayne Circuit Court
LC No. 07-717622-CF

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendants Platinum Sports, Ltd., and Patio Properties, Inc. (hereafter "defendants"), appeal the order of abatement of a public nuisance that required defendants' adult entertainment establishment to be padlocked for a period of one year. We affirm.

The parties entered into a consent judgment after the prosecutor had filed a complaint for abatement of a public nuisance and for judgment of forfeiture with respect to alleged unlawful activities at defendants' All Star Lounge located at 14541 West 8 Mile Road (hereafter "the club"). Soon after the consent judgment was entered, certain events transpired at the club which the prosecutor claimed violated the consent judgment, leading to a motion to show cause, an evidentiary hearing on the alleged violations, and a ruling by the trial court that the violations had been established by the prosecutor. The prosecutor alleged, and the trial court found, that defendants violated the consent judgment by employing a female minor as a dancer, by allowing

unlicensed dancers to perform in the club, by permitting lap dances in the club, and by altering and deleting required surveillance videotape.

Initially, we address the prosecutor's argument that this Court lacks jurisdiction because any appeal by defendants had to be in the form of an application for leave to appeal, not an appeal as of right. The prosecutor contends that the order being appealed was a postjudgment order issued pursuant to, consistent with, and to enforce the terms of the underlying consent judgment; therefore, it was not appealable by right. In a civil suit, a final judgment or final order is generally appealable as of right, and a final judgment or final order is defined as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties[.]" MCR 7.203(A)(1); MCR 7.202(6)(a)(i). The *first* judgment or order entered in this case that disposed of the prosecutor's claims and adjudicated the rights and liabilities of the parties would appear to be the consent judgment.[1] Postjudgment orders affecting the custody of a minor or awarding or denying attorney fees and costs are appealable by right, MCR 7.203(A)(1); MCR 7.202(6)(a)(iii) and (iv), but of course this case does not fall into any of these categories. Nevertheless, we decline to resolve the jurisdictional question posed by the prosecutor. If an order is not appealable by right, in the interest of judicial economy, we have the discretion to treat a plaintiff's claim of appeal as an application for leave to appeal, grant leave, and then address the substantive issues presented. *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003). Assuming that defendants' appeal can be pursued only by application for leave, we invoke our discretion to grant leave and to substantively address defendants' arguments.

Defendants first argue that the trial court lacked jurisdiction over the "contempt" hearing because the prosecution failed to comply with the mandatory requirements of MCR 2.119(B) and MCR 3.606(A)(1), given that the affidavit of the assistant prosecutor that was attached in support of the motion to show cause reflected a lack of personal knowledge. MCR 3.606 provides in pertinent part:

> (A) Initiation of Proceeding. For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
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> (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or
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> (2) issue a bench warrant for the arrest of the person.

MCR 2.119(B), which governs the form of affidavits used in motion practice, provides in relevant part as follows:

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[1] We note that, "[b]y agreeing to the terms of [a] consent judgment, [a] defendant cannot challenge it on appeal." *Michigan Bell Tel Co v Sfat*, 177 Mich App 506, 516; 442 NW2d 720 (1989), citing *Longo v Minchella*, 343 Mich 373, 377-378; 72 NW2d 113 (1955).

(1) If an affidavit is filed in support of or in opposition to a motion, it must:

(a) be made on personal knowledge;

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

"'If an inadequate affidavit is the predicate which underlies the contempt proceeding or if no affidavit at all accompanies the petition, the court lacks jurisdiction over the person of the alleged contemnor.'" *In re Contempt of Steingold*, 244 Mich App 153, 159; 624 NW2d 504 (2000), quoting *Michigan ex rel Wayne Prosecutor v Powers*, 97 Mich App 166, 168; 293 NW2d 752 (1980).

Here, the assistant prosecutor's affidavit indicated that the averments were based on personal knowledge *or* based on "information and belief derived from a review of police reports and or from having discussed the facts contained herein with police officers and/or investigators[.]" Further, given the nature of the averments, we question whether the affiant had "personal knowledge" of any of the alleged violations of the consent judgment. However, reversal is unwarranted.

We first note that the consent judgment specifically provided for a show cause hearing upon an alleged violation of the consent judgment, with the relief to consist of an order of abatement padlocking the club or other appropriate equitable relief if a violation was established. The consent judgment further provided that the trial court had "*continuing jurisdiction* to adjudicate any and all matters related to the enforcement of th[e] Consent Judgment." (Emphasis added.) In *Porter v Porter*, 285 Mich App 450, 461; 776 NW2d 377 (2009), this Court addressed and rejected an argument that because an order to show cause was entered absent compliance with the requirements of MCR 2.119(B) for affidavits, the trial court lacked jurisdiction over a contempt proceeding. The *Porter* panel rejected the argument for multiple reasons, including the following basis:

> Even assuming that MCR 3.606(A) applies in domestic relations cases, we still conclude that the lack of a notary affixed to defendant's petition for an order to show cause did not deprive the trial court of its jurisdiction to invoke its contempt powers in civil proceedings to enforce its own orders for parenting time, nor does the lack of notarization warrant setting aside the court's contempt orders. Once a circuit court obtains jurisdiction over divorce proceedings, it retains that jurisdiction over custody and visitation matters until the child attains the age of 18. Moreover, Michigan courts have the inherent independent authority to punish a person for contempt. Consequently, even if the contempt proceedings were procedurally defective, the trial court was not deprived of its jurisdiction over the subject matter or the parties. [*Id.* at 461-462 (citations omitted).]

Just as the lower court retained jurisdiction in *Porter*, the trial court here, under the plain language of the consent judgment, retained and had continuing jurisdiction over the parties relative to alleged violations of the consent judgment. By stipulating to the consent judgment, defendants effectively agreed that the trial court could have continuing personal jurisdiction over them. This Court and the United States Supreme Court have long recognized that parties may agree, even in advance of litigation, to submit to the personal jurisdiction of a particular court. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 219; 724 NW2d 724 (2006).

Furthermore, while the prosecutor's motion to show cause referenced holding defendants in "contempt," it also indicated, in the alternative, that the prosecutor sought an order for nuisance abatement for violations of the consent judgment. At the evidentiary hearing, the prosecutor stated that he was not seeking to have the trial court hold defendants in criminal or civil contempt of court, and the trial court never actually punished defendants for contempt by way of fines or imprisonment. See MCL 600.1711(2) (with respect to any contempt committed outside the immediate view and presence of the court, "the court may punish it by fine or imprisonment, or both"); *Porter*, 285 Mich App at 455. Rather, the trial court simply imposed the remedy agreed to by the parties in the consent judgment relative to any violations of that judgment, i.e., padlocking of the club. The consent judgment provided that "alleged violations *shall be* dealt with under the provisions of th[e] Consent Judgment." (Emphasis added.) Accordingly, any problems with the affidavit for purposes of MCR 3.606(A)(1) are irrelevant.

MCR 2.119(B) itself does not mandate the filing of an affidavit with a motion, but if one is filed, MCR 2.119(B) provides the technical requirements. *Porter*, 285 Mich App at 461. Although the assistant prosecutor's affidavit did not conform to the requirements of MCR 2.119(B), we find that an affidavit is not even necessarily required where a party claims in a motion that an underlying consent judgment was violated, said party seeks equitable relief set forth in the consent judgment as the remedy for a violation, the consent judgment provides for continuing or retained jurisdiction, and where a full blown evidentiary hearing is to be conducted wherein all parties are given the opportunity to submit evidence and arguments regarding the alleged violations. See *Porter*, 285 Mich App at 463 ("Our review of the record convinces us that plaintiff was accorded rudimentary due process, and there was sufficient evidence of a willful violation of the court's order. We therefore decline to reverse on the basis of a technical violation of MCR 3.606[A]"); MCL 600.1711 (court may punish contempt committed outside the presence of the court "after proof of the facts charged has been made by affidavit *or other method and opportunity has been given to defend*") (emphasis added).

Defendants next argue that the trial court deprived them of due process by concluding that the consent judgment was violated by the simple failure to have any videotape of the club's premises at the time a shooting occurred outside the club, where the conduct alleged by the prosecutor to have violated the consent judgment was that defendants actively deleted or altered the video footage, not that they merely failed to have and produce the footage. There is some merit to defendants' argument. The motion to show cause alleged that the "video recording had been significantly deleted/altered" in violation of the consent judgment, which required defendants to videotape the club's premises and to maintain the videotape for 60 days after recording. There was clear testimony by a police officer, who was qualified as an expert in video technology, that, in his opinion, video footage had been purposefully deleted through use of the digital video recorder's (DVR's) purge feature. When defendants attempted to cross-

examine the officer with such questions as whether he was advised by club personnel that the DVR had malfunctioned on several occasions, as well as questions pertaining to the "purge" password and club employees who knew the password and had access to the DVR, the trial court, absent any objection by the prosecutor, cut off the questioning as irrelevant. The trial court stated:

> Doesn't make any difference. The consent judgment requires that the system be maintained and working. So, this line of questioning, as far as I'm concerned, is a waste of time.
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> * * *
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> Look, I don't know where you're going with this but either the system works or it doesn't. This business was required to have a working system. If it did not record the event that happened between 1:15 and 1:40 [shooting], they are in violation of the consent agreement.

The trial court rejected defense counsel's contention that the questioning was relevant as to the prosecutor's alleged accusation that defendants deleted or altered the video footage.[2] Counsel argued that the prosecution never alleged a consent judgment violation simply on the basis that videotape of the club's parking lot at the time of the shooting was missing or did not exist. While the trial court was correct that a violation of the consent judgment would include a mere failure to have and produce videotape of the past 60 days, we agree that the trial court erred in cutting off the cross-examination because the prosecutor alleged that defendants actively deleted or altered the videotape, not that relevant footage was simply nonexistent. However, any error was harmless, MCR 2.613(A), because ultimately the trial court was correct in concluding that defendants violated the consent judgment in relationship to employing unlicensed dancers contrary to city ordinance, permitting the female minor to dance contrary to law, and allowing lap dances by the minor, which were in fact allegations contained in the prosecutor's motion. Indeed, the evidence was overwhelming and essentially uncontroverted with respect to the unlicensed dancers and the female minor's performances at the club as a dancer.[3] Reversal is unwarranted.

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[2] We note that the trial court, when ruling from the bench, found a violation of the consent judgment based on a failure to have and produce the videotape; however, the subsequent abatement order that was entered by the court indicated that the violation occurred when defendants altered and deleted the videotape.

[3] Moreover, the trial court, had it recognized the limitations set by the allegations, could have soundly permitted an amendment of the allegations to conform to the evidence without prejudicing defendants' ability to defend, where the issues of alteration and deletion were closely and necessarily associated with any issue concerning the existence and retention of the videotape. This is all the more true, given that defendants planned to defend on the basis that there was a parallel parol agreement that the video surveillance provisions in the consent

Defendants next argue that the trial court erred in applying the preponderance-of-the-evidence standard with respect to its rulings. Defendants maintain that in criminal contempt proceedings, it must be clearly and unequivocally shown beyond a reasonable doubt that there was a willful disregard or disobedience of a court order, while in civil contempt proceedings, there must be clear and unequivocal evidence establishing contempt of court. Defendants argue that the prosecutor's motion to show cause and resulting litigation constituted criminal contempt proceedings. We first note, once again, that the evidence of violations of the consent judgment was overwhelming and effectively conclusive under any standard or burden of proof, including beyond a reasonable doubt. Regardless, as discussed earlier, while punishment for contempt was contemplated in the motion and order to show cause, the prosecution decided not to pursue any form of contempt, nor did the trial court ultimately punish defendants for contempt of court in the form of a fine or imprisonment. See MCL 600.1701 ("The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of [contempt]"); MCL 600.1711(2). Rather, the prosecutor requested and the trial court invoked the padlocking remedy expressly provided for in the consent judgment upon a violation of the judgment, which provision was necessarily agreed to by defendants in stipulating to entry of the consent judgment. Again, the consent judgment provided that "alleged violations *shall be* dealt with under the provisions of th[e] Consent Judgment." (Emphasis added.) We also point out that in a civil contempt situation, the burden or standard is a preponderance of the evidence. *Porter*, 285 Mich App at 457. In *Porter*, *id.* at 456-457, this Court indicated that criminal contempt must be proven beyond a reasonable doubt; however,

> [i]n contrast, in a civil contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated.

In sum, defendants have not established that the trial court erred by employing the preponderance-of-the-evidence standard.

Defendants next argue that the trial court erred in entering the abatement order when the prosecutor failed to comply with MCR 2.602, which provides in pertinent part:

> (B) An order or judgment shall be entered by one of the following methods:
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> (1) The court may sign the judgment or order at the time it grants the relief provided by the judgment or order.
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> (2) The court shall sign the judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's decision.

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judgment were not to be applicable until 60 days after entry of the judgment, which evidence was excluded by the trial court in a ruling unchallenged on appeal.

(3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.

(a) If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.

(b) Objections regarding the accuracy or completeness of the judgment or order must state with specificity the inaccuracy or omission.

(c) The party filing the objections must serve them on all parties as required by MCR 2.107, together with a notice of hearing and an alternate proposed judgment or order.

(4) A party may prepare a proposed judgment or order and notice it for settlement before the court.

Defendants complain that the abatement order was not entered pursuant to any of the procedural mechanisms listed above, that the prosecutor failed to serve defense counsel with the proposed order prior to the date of the hearing, that the prosecutor never filed the proposed order, thereby precluding defendants from filing objections, such as under the seven-day rule, that the trial court failed to make sufficient inquiry into defendants' objections, and that the court did not give defense counsel an opportunity to delineate his objections.

At the conclusion of the evidentiary hearing, the trial court ruled that defendants violated the consent judgment and that the club would be padlocked for one year. Given the many associated technical and logistical issues related to padlocking the club, the trial court directed the parties to make an attempt to compose an order agreeable to all, warning the parties that if an agreed-upon order could not be worked out, the court would issue its own order at a subsequent hearing that was then scheduled. The prosecutor prepared a proposed opinion, but he did not file or serve it pursuant to the seven-day rule, MCR 2.602(B)(3). The transcript of the hearing to enter an order reveals that the prosecutor did provide the proposed order to defendants before the hearing, that defendants raised a number of objections, and that the prosecutor made some changes on the basis of the objections.

Given that the trial court delayed imposing the padlocking remedy or relief until the scheduled hearing to enter an order, and considering that the remainder of the relief in the abatement order was not actually ruled upon by the court at the evidentiary hearing, the abatement order would appear to have been properly entered pursuant to MCR 2.602(B)(1),

which provides that "[t]he court may sign the judgment or order at the time it grants the relief provided by the judgment or order." Additionally, MCR 2.602(B)(4), which simply provides that a "party may prepare a proposed judgment or order and notice it for settlement before the court," could be viewed as being applicable, where the prosecutor prepared a proposed judgment and presented it to defense counsel at some point before the hearing to enter an order, and where this hearing had already been previously noticed and scheduled at the time of the evidentiary hearing. Regardless, any compliance failure with MCR 2.602(B) was harmless and did not result in a substantial injustice. MCR 2.613(A). The trial court allowed defense counsel to voice objections to the proposed order at the hearing, and counsel argued that bankruptcy proceedings precluded entry of the order. After rejection of the bankruptcy argument, the trial court inquired of defense counsel, "Any other objections?" Defense counsel expressed that he had "several objections" but failed to elaborate. He simply stated that he would not consent to the abatement order, nor sign it as to form and content. Thus, the trial court gave defendants an opportunity to voice any objections, and there is no indication in the record that the court was not going to permit defendants to elaborate on their objections. Reversal is unwarranted.

Finally, defendants contend that the trial court deprived them of due process in finding that a violation of the repealed dance-license ordinance constituted a violation of the consent judgment, where no dance license was required when the order to show cause was signed by the court, and where the newly-enacted ordinance governing all employees in adult establishments contained no savings clause relative to the old dance-license requirement. The repeal or amendment of the dance-license ordinance occurred on May 3, 2010, and the order to show cause was entered on May 11, 2010. We first note that there is no dispute that on the date the dancers were ticketed for failure to have a dance license, April 16, 2010, the dance-license ordinance, as opposed to the new ordinance regarding a "sexual oriented business employee license," was in place and operative.

"In the absence of a saving clause, the repeal of a criminal statute operates from the moment it takes effect, to defeat all pending prosecutions under the repealed statute." *People v Lowell*, 250 Mich 349, 353; 230 NW 202 (1930). In *United States v Chambers*, 291 US 217, 222-223; 54 S Ct 434; 78 L Ed 763 (1934), the United States Supreme Court observed:

> Upon the ratification of the Twenty-First Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality. The National Prohibition Act, to the extent that its provisions rested upon the grant of authority to the Congress by the Eighteenth Amendment, immediately fell with the withdrawal by the people of the essential constitutional support. The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment, for a violation of the National Prohibition Act (27 USCA) alleged to have been committed in North Carolina, would involve an attempt to continue the application of the statutory provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. The continued prosecution necessarily depended upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings

> can be had to enforce it in pending prosecutions unless competent authority has kept the statute alive for that purpose.

Here, we find that the fatal flaw in defendants' argument is that this case did not constitute a criminal prosecution, as was the situation in all of the cases cited by defendants. Instead, we are addressing a violation of the consent judgment, which was an agreement voluntarily entered into by defendants, and which controlled entirely any issues concerning alleged violations. The consent judgment provided that defendants agreed "that if they employ and/or allow dancers, all must be licensed under current City of Detroit requirements." The dancers ticketed at defendants' club did not have dance licenses under the then current and operative ordinance requirements. Generally speaking, a consent judgment can encompass an agreement not to engage in illegal as well as legal activities; it is a matter of contract. "[A] consent judgment is in the nature of a contract," and ordinary contract principles govern its interpretation. *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). The consent judgment or contract in the case at bar was clear, plain, and unambiguous, a dancer was required to have a license pursuant to whatever ordinance was in existence and operative at the time she was employed by the club. A dance license was required under the ordinance on April 16, 2010, and several dancers employed by the club did not have the required license, thereby violating the consent judgment. We also note that even after May 3, 2010, adult dancers were still required to have licenses, except that the new licenses carried a different moniker and had a wider reach; therefore, even assuming the applicability of the criminal cases cited by defendants, they would not have prohibited the prosecutor's action here, as the licensing scheme was essentially saved with respect to dancers in adult establishments.

We hold that the trial court had jurisdiction over the proceedings below, that any error relative to the court's rulings on the alleged violation of the video surveillance provisions in the consent judgment was harmless given the overwhelming evidence of other consent-judgment violations, and that the trial court did not err in employing the preponderance-of-the-evidence standard. We further hold that MCR 2.602 was not violated and any assumed violation was harmless where defendants were given the opportunity to voice objections to the prosecutor's proposed abatement order. Finally, we hold that the repeal or amendment of the dance-license ordinance was irrelevant, where compliance with a consent judgment was at issue and not a criminal prosecution, the dance-license ordinance was operative at the time police found numerous violations, and where the new ordinance still required a license.

Affirmed. Having prevailed in full, the prosecutor is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray